Office-Supreme Court, U.S.
FILED
FEB 28 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

L. N. D. WELLS, JR.,
1601 National Bankers Life Building,
Dallas 1, Texas.
DAVID PREVIANT,
511 Warner Theatre Bldg.,
Milwaukee 3, Wisconsin.
Counsel for Petitioner

Of Counsel:
MULLINAX, WELLS, MORRIS & MAUZY,
1601 National Bankers Life Building,
Dallas 1, Texas.
GOLDBERG, PREVIANT & UELMEN,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin.

REILLY PUBLISHING COMPANY - 1710 S. HARWOOD - DALLAS - HA 8-8385

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	13
Certificate of Service	15
Appendices:	
A-1—Original NLRB Decision—3/6/61	1a
A-2—NLRB Decision on Remand—7/20/62	27a
A-3—Opinion of Court of Appeals—12/5/63	33a
B —Statutes Involved	1b

	Page
Auto Parts Co., 107 NLRB 242	9
Cone Bros. Contracting Co., 317 F. 2d 3	10, 11
District 50, United Workers of America (Tungsten Mining Corp.), 106 NLRB 903	9
Highway Truck Drivers and Helpers Local 107 (Riss & Company, Inc.), 130 NLRB No. 91	9
Highway Truck Drivers and Helpers Local 107 (Virginia-Carolina Freight Lines, Inc.), 123 NLRB 551	9
In re Club Troika, Inc., 2 NLRB 90	8
In re Everist, 142 NLRB No. 20	10, 11
International Woodworkers of America (W. T. Smith Lumber Co.), 116 NLRB 507	9
Local No. 3887, United Steel Workers of America (Stephenson Brick & Tile Company), 129 NLRB 6	9
NLRB v. Peter C. K. Swiss Chocolate Co., 130 F. 2d 503	12
NLRB v. Rockaway News Supply Co., 197 F. 2d 111	7
NLRB v. Washington Aluminum Co., 370 U.S. 9	11, 13

Page

Rockaway News Supply Co., Inc.,
95 NLRB 336 . . . . . 8, 9

United Electrical, Radio & Machine Workers
(American Rubber Products Corporation),
106 NLRB 1372 9

Warehouse & Distribution Workers Union
(Coca-Cola Bottling Co. of St. Louis),
115 NLRB 1506 9

Other Authorities

Annotation, 31 ALR 2d 519 (1953) 8, 12

Jurisdictional Statutes
28 U.S.C. 1254(1) 2

Labor Management Relations Act of 1947,
as amended, 61 Stat. 136, 29 U.S.C. §151,
et seq.

§7 . . . . . 3, 6, 9, 11

§8(a)(1) 3, 11

§8(b)(1) 3

§8(b)(4)(B) 3

§10 2

§13 3

§502 3

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No.

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION No. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Teamsters, Chauffeurs & Helpers Local Union No. 79, (herein "Petitioner") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 5, 1963.

OPINIONS BELOW

The National Labor Relations Board Decision and Order issued March 6, 1961, is reported at 130 NLRB 1208, and is printed in Appendix A at pp. 1a to 8a.

The Decision and Order of the National Labor Relations Board issued on July 20, 1962, after remand from the Court of Appeals, is reported at 137 NLRB 1545, and is printed in Appendix A at pp. 27a to 32a.

The Opinion of the United States Court of Appeals for the District of Columbia Circuit rendered December 5, 1963, denying our petition to review the orders of NLRB, is not yet officially reported. It is reproduced at 48 CCH Labor Cases ¶18,626; 54 LRRM 2707; and is printed in Appendix A at pp. 33a to 36a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered December 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Section 10(e) of the Labor Management Relations Act of 1947 as amended, 29 U.S.C. §160(e).

QUESTIONS PRESENTED

Does discharge of truck drivers for refusal to cross a primary picket line established at the premises of a shipper constitute violation of Sections 7 and 8(a)(1) of the Labor Management Relations Act?

Is such refusal to cross such picket line [found by a majority of NLRB to be a "protected" activity under §§7 and 8(a)(1) of the statute, 29 U.S.C. 157, 158(a)(1)] a right to which the statute grants protection, despite its adverse affect on carriers' business?

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947, as amended (61 *Stat.* 136, 29 *U.S.C.* 151, *et seq.*; particularly §§7, 8(a)(1); 8(b)(1); 8(b)(4)(B); 13; and 502, are printed in Appendix B, *infra*, p. 1b.

STATEMENT

Eight truck drivers employed by a common carrier, Redwing,[1] were discharged for refusal to cross a primary picket line at the entrance to the plants and mines of Virginia-Carolina Chemical Co. (herein "V-C").

The V-C employees, members of International Chemical Workers Local Union, called a strike and established primary picket lines at V-C. For ten

[1] "Redwing" is used throughout this petition to refer collectively to Redwing Carriers, Inc. and Rockana Carriers, Inc., the employers who were respondents before the NLRB.

days V-C made little effort to operate, and Redwing's hauling operations to and from V-C were reduced to occasional trips. Even these were harried by the V-C strikers, pickets and their sympathizers shouting epithets, taking motion pictures, physically blocking the roadways, threatening bodily harm, kicking one driver and threatening others.[2] It is stipulated that thereafter misconduct occurred at and in the vicinity of the V-C picket line which created hazardous conditions of employment for persons required to cross the V-C picket line.

On June 1, V-C requested the Company to resume

[2]The *Board's* brief in the Court of Appeals states the Board's findings as follows:

"On May 27 Rockana driver Donald Shirley was stopped at an entrance to V-C's property by pickets who took moving pictures, shouted 'scab' and 'picket line breaker,' and asked him not to cross the picket line 'until something was straightened out' (J.A. 17; 71, 73). Shirley turned back and promptly called the Company for instructions. He was told to wait, that someone would come to give him safe passage through the line. Later he was escorted into V-C by a deputy sheriff (J.A. 10, 17; 71-72).

"On May 29, Rockana driver Andre Francoeur approached the picket line at one of V-C's facilities to make a pickup. As he did so, between 25 and 30 pickets 'strung themselves across the road' blocking his passage (J.A. 17; 59-60). When Francoeur stopped, the apparent leader of the pickets 'jumped on the running board' of the truck and told Francoeur that 'it would be more healthy' if he turned 'around and did not make the pickup' (J.A. 17; 60). Francoeur turned around and went to a nearby grocery store, followed by about a dozen pickets (J.A. 10, 17; 60-61, 62). There he telephoned the Company and reported what had happened. He was told to stay where he was and that someone would be sent to help him (J.A. 17; 61). After this call, the pickets milled around Francoeur threatening to assault him and crowding him out of the store (J.A. 17-18; 61-62). As Francoeur started to leave, he was kicked by one of the pickets (J.A. 10, 18; 62-63). When he drove off the pickets followed his truck for about two miles. Upon returning to the terminal, Francoeur reported to the Company and to the other employees what had happened (J.A. 18; 62-63, 66).

"Also on May 29, while Rockana drivers John Sewell and Aubrey Cribbs were eating supper in a diner near V-C's premises, they were approached by 8 or 10 men and told 'I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen' (J.A. 10, 18; 106). Sewell replied, 'If that is the way it is I am not going in there.' As Sewell and Cribbs left the diner, the men stated 'you boys be sure and watch your steps' (J.A. 18; 106)."

The letters "J.A." refer to the Joint Appendix filed in the Court of Appeals The letters "S.A." refers to the Supplemental Appendix there filed.

normal hauling operations. The next morning, the Company gave V-C assignments to some of its drivers. After discussing the assignments among themselves and with other drivers, the drivers assigned to V-C informed the Company that they were available for other work, but that they would not cross the V-C picket line because they anticipated personal injury and damage to the Company's equipment. The company advised them that they must accept their V-C assignments or be discharged. Six drivers refused to accept the assignments. The Company discharged them and transferred the assignments to other drivers. Another employee was similarly discharged that afternoon.

The Board's trial examiner held that "Section 7 of the Act recognizes a right of employees to work together for their mutual aid or protection . . . the activity here involved was concerted activity protected by the Act . . ." (J.A. 24-25). The NLRB examiner further concluded that the drivers were motivated by the good faith belief that abnormally dangerous conditions existed, further justifying the determination not to cross the picket line,[3] J.A. 23-24.

Accordingly, the examiner concluded that the drivers' refusal to cross the picket line at the customer's premises "was protected concerted activity and that their terminations were therefore unlawful", J.A. 26. The examiner recommended that the

[3]Though the examiner found the drivers in good faith believed abnormally dangerous conditions existed (J.A. 24); he further found that the conditions surrounding the picketing "were sporadic and uncertain and it was speculative whether employees would be subjecting themselves to harm by going into the area." (J.A. 24).

carrier-employer be required to cease and desist from interfering with employees in the exercise of Section 7 rights, and to reinstate and make whole the drivers for any loss of pay suffered, J.A. 28.

The Board, by a three member panel, reversed, and dismissed the complaint, J.A. 6-13. The Board's Decision, while adopting the findings of the Examiner,* held that neither the facts there found nor the record established that abnormally dangerous conditions existed in connection with the crossing of the picket line (J.A. 12).

The Board further held that an employee's refusal in the course of his assigned duties to cross a picket line at the plant of another employer, while continuing on the job for the performance of his other work is unprotected activity, for which he could properly be discharged.

On remand, the Board by a three to two majority found that the employees had engaged in a *protected* concerted activity when they refused to cross the picket line, but held that Redwing in furtherance of its "right to attempt to run [its] business" could discharge complainants because of their refusal to cross the V-C picket line.

Thus the Board holds that the "protected concerted activity" of refusal to cross a picket line, is not to be protected, but must give way to employer's "right to attempt to run [its] business."

The Court of Appeals after summarizing the

*Except to the extent they are inconsistent with the Board's Decision (J.A. 7).

above facts[5] cited *NLRB v. Rockaway News Supply Co.*, 197 F. 2d 111 (C.A. 2, 1952), aff'd. on other grounds, 345 U.S. 71 (1953), as support for the Board's Order, and denied our petition to review.

REASONS FOR GRANTING THE WRIT

1.

By the decisions below the refusal to cross a picket line is "*protected* concerted activity" which the Board will not protect against employer's assertion that he must (in the interest of running his business) discharge those who engage in "protected" concerted activity. Such holding is neither good law nor good labor relations.

Either an activity is "protected" under the statute, in which event the Board has the duty of protecting it; or it is "unprotected." The present decision, by which the Board holds the activity "protected," but refused to "protect" it, makes for chaos and confusion for both employer and employee presented with questions as to whether to cross a picket line.

Since 1936 the Board and the courts have been met with questions as to whether an employer may lawfully discharge an employee who respects a picket line. In that year the Board held that dis-

[5]The *facts* as found by the Board are not disputed. We do dispute certain conclusions which the Board draws from the facts which it found. We note that the Court of Appeals misapprehended the facts as found by the Board; viz: The Court of Appeals at p. 2 of its slip opinion finds that complainants' "... services were terminated by the employers *and new employees were hired.*" Emphasis added. But the Board's own statement of the case [Board's Brief to Court of Appeals, p. 5] asserts: ". . . Six drivers refused to accept the assignments (J.A. 9-10; 19; 46; 127-132). The company discharged them *and transferred the assignments to other drivers* (J.A. 19; 101-102, 124)." Emphasis added.

charge for respecting a picket line was unlawful. *In re Club Troika, Inc.*, 2 NLRB 90, 94 (1936). There followed a long line of cases under the Wagner Act holding it unlawful to discharge because of respect for a picket line.[6]

In *Rockaway News Supply Co., Inc.*, 95 NLRB 336 (1951), the Board held it an unfair labor practice for employer to discharge an employee who refused to cross a picket line. The Second Circuit, by 2 to 1, refused to enforce, 197 F. 2d 111 (C.A. 2, 1952). Certiorari was granted on the assertion that the questions as to the respective rights of employer and employee regarding honoring picket lines were of extreme importance in the administration of the Act. The Board, the affected employer, and numerous *amici* (including the A. F. of L. and the CIO) filed briefs pointed principally to the important question of whether an employer could lawfully discharge an employee for refusal to cross a lawful picket line of another union at the plant of a union other than his own.

This Court divided (6-3); the majority opinion, by Mr. Justice Jackson refusing to make a "determination of rights or duties respecting picket lines broader than this [collective bargaining] contract itself prescribes," 345 U.S. 71 at 79. The majority in *Rockaway* held the "no strike" provision of the collective bargaining agreement to be applicable and controlling; and did not reach the basic question of the legality of discharge for refusal to cross the picket line. Mr. Justice Black's dissent on broader

[6] See Annotation, *"Discharge of employee who refused to cross picket line as unfair labor practice,"* 31 ALR 2d 519 (1953), and cases there cited.

grounds ". . . agree[d] with the Labor Board that it was an unfair labor practice for the employer to discharge a union employee who refused to cross a picket line." 345 U.S. at 81.

The instant case presents the first opportunity since *Rockaway* for a determination of the issue.

Meanwhile the NLRB has taken various positions. In the *Auto Parts* case, 107 NLRB 242 (1953) it held that the refusal to cross the picket line was not a protected concerted activity. Similarly in its original decision in the case at bar, the refusal to cross was held "not protected." On remand (by 3-2) the Board held the refusal "protected," but refused to protect it.

Meanwhile, the Board was holding in a long line of cases that the concomitant right *not* to engage in protected concerted activity was violated by a union which coerces employees who wish to refrain from respecting a picket line; i.e. the Board holds that union interference with employees who go through the picket line denies to such employees rights guaranteed in Section 7.[7]

---

[7]See e.g., *District 50, United Workers of America (Tungsten Mining Corp.)*, 106 NLRB 903, 907-908 (1953); *United Electrical, Radio & Machine Workers (American Rubber Products Corporation)*, 106 NLRB 1372, 1377-1378 (1953); *Warehouse & Distribution Workers Union (Coca-Cola Bottling Co. of St. Louis)*, 115 NLRB 1506, 1507, 1510-1511 (1956); *Highway Truck Drivers and Helpers, Local 107 (Virginia-Carolina Freight Lines, Inc.)*, 123 NLRB 551, 552, 558 (1959), enf'd. 273 F. 2d 815 (D.C. Cir. 1959).

These cases, on their facts, involved acts of coercion by a picketing union directed at employees of the struck employer. But this fact is immaterial. The Board has been equally consistent in holding, subsequent to *Auto Parts Co.*, 107 NLRB 242 (1953), that a striking union which coerces truck-driver employees of other employers who wish to cross the picket line thereby denies to such truck-driver employees their protected right to refrain from respecting the picket line. *International Woodworkers of America (W. T. Smith Lumber Company)*, 116 NLRB 507, 509, 519-520, 525-526 (1956), enf'd 243 F. 2d 745 (5th Cir. 1957); *Local No. 3887, United Steel Workers of America, AFL-CIO (Stephenson Brick & Tile Company)*, 129 NLRB 6, 7-9 (1960), enf'd 290 F. 2d 587 (5th Cir. 1961); *Highway Truck Drivers and Helpers Local 107 (Riss & Company, Inc.)*, 130 NLRB No. 91, 47 LRRM 1403, 1404-1405 (1961).

Finally, in two cases[8] decided since the second decision in the instant case, the Board held discharges for refusal to cross a picket line in a context of anti-unionism to be unlawful.[9]

In these circumstances, more than twenty-five years after the passage of the original Act neither employer, employee, or union can act with confidence in the oft-recurring picket line situation. The simple question which the truck driver often meets: "Must I go through that picket line to hold my job"

---

[8] *In re Everist*, 142 NLRB No. 20, 1963; *Cone Bros. Contracting Co.*, 317 F. 2d 3 (C.A. 5, 1963).

[9] The explication of the *Redwing* holding which the Board included in its recent *Everist Decision, 142 NLRB No. 20* (April, 1963) cannot be squared with the language of the *Redwing* Opinion or the Redwing record. In *Everist* the Board said; D-5325, Slip Opinion, p. 4:

> "• • • in Redwing, the Board found that an employee's refusal to cross a picket line was protected activity. Redwing holds, in effect, that a 'discharge' for refusal to cross a picket line is an exception to the general rule that employees may not be discharged for engaging in protected concerted activity. It is therefore not a discharge for cause, but merely a permissible act in furtherance of the employer's overriding right to keep his business going by replacing such employees. To this extent, at least, the employees involved herein are similar to economic strikers, who may also be replaced by an employer to permit continued operation of the business but who, if not permanently replaced, are entitled to reinstatement upon unconditional application. It follows, therefore, that where, as here, no permanent replacement has occurred at the time the claimants unconditionally apply for reinstatement so that their jobs are still available, the employer is obligated to return them to work. In light of its continued need for employees, the Respondent's argument that it was seeking to replace the claimants in order to operate its business falls and its refusal to reinstate them because of their refusal to cross a picket line necessarily constitutes a penalty for engaging in that protected activity. Accordingly, we find that by its conduct the Respondent violated Section 8(a)(1) of the Act."

Had this rationale actually been followed in *Redwing*, complainants could not have been permanently terminated for (1) Pierola testified they were not replaced by "new" employees; rather others were transferred to their assignments. (2) the *Redwing* supplemental opinion specifically eschews the very distinction between "replacement" and "discharge," Supp. App., p. 11, which it applies in *Everist*.

must be answered: the law protects you in your decision not to cross the picket line—for you engage in a "protected" concerted activity; but the NLRB will permit your employer to fire you for engaging in the "protected" activity."[10]

2.

The decisions below ignore and are contrary to the rationale of this Court's Opinion in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). There this Court held: "protected" concerted activities within the guarantee of Section 7 and 8(a)(1) may not lawfully be the basis for employer discipline unless they are unlawful, violent, in breach of contract or "indefensible" because unrelated to legitimate worker concern and indicative of a disloyalty to the workers' employer. 370 U.S. 9 at 17.

The concerted activities here at issue, refusal to cross a picket line, do not fall within any of these exceptions. To the contrary, the refusal to cross a picket line is a traditional and valid means by which workmen seek to give and to gain mutual support. Cf. Annotation, "Discharge of employee who refused

---

[10] *Cone* and *Everist*, *supra*, note 8, point to NLRB protection of the "protected" activity, but apparently only when the discharges are in a context of anti-union animus. Of course the problem usually arises in a context in which that factor is unascertainable; i.e. a driver is told to make a delivery to a particular point. He arrives there and sees a picket line. What are his rights and duties? Until this Court speaks on that question, exercise of the driver's "protected" right not to cross will get him fired.

to cross picket line as unfair labor practice," 31 ALR 2d 519 (1953)."

Moreover, this record shows the necessity of "mutual protection" which the complainants sought in their concerted refusals to cross the V-C picket line, for the drivers were cursed and abused, threatened with assault, kicked, followed, and as the Board found on the very day that these drivers refused to cross the picket line a convoy of other Redwing trucks sent to the V-C premises was met with "attempted blocking and cutting off the road of Redwing's trucks, cursing, threatening, throwing objects at drivers, strewing nails on the road, and the firing of a shot by an unidentified source." Moreover, it is stipulated that on and after the date of the refusal to cross the picket line, "there was sub-

---

[11]Cf. Judge Learned Hand's Opinion in *NLRB v. Peter C. K. Swiss Chocolate Co.*, 130 F .2d 503, 505-506:

"When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established in 'mutual' aid in the most literal sense, as nobody doubts. So too of those engaging in a 'sympathetic strike,' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, 7 Cir., 111 F. 2d 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e.g., *Duplex Printing Co. v. Deering*, 254 U.S. 443, 471, 472, 474• • •), but it seems to us that the [Wagner] act has put an end to this."

stantial damage to [Redwing] equipment by nails and thrown objects . . . . [their] drivers were threatened, assaulted and shot." It is further stipulated that after June 2 there was misconduct at and in the vicinity of the picket lines and violence which created hazardous conditions of employment for persons required to cross these picket lines.

In these circumstances, refusals to cross the picket line were not merely abstract "protected" concerted activities. They were, paraphrasing this Court's opinion in *NLRB v. Washington Aluminum*, "concerted activities by employees for the purpose of trying to protect themselves" from dangerous working conditions. As such, they were "unquestionably activities to correct conditions which modern labor management legislation treats as too bad to have to be tolerated . . ." *NLRB v. Washington Aluminum*, 370 U.S. 9 at 17 (1962).

The Congress has said that employees are protected in the exercise of such concerted activity. We respectfully suggest that the Board's refusal to protect the activity should be examined and reversed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

By .....

L. N. D. WELLS, JR.,
1601 National Bankers
Life Building,
Dallas 1, Texas.

By .....

DAVID PREVIANT,
511 Warner Theatre Bldg.,
Milwaukee 3, Wisconsin.

February 27, 1964

Of Counsel:

MULLINAX, WELLS, MORRIS
& MAUZY,
1601 National Bankers Life Bldg.
Dallas 1, Texas.

GOLDBERG, PREVIANT & UELMEN,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of February, 1964, a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon counsel for Respondent and Intervenor by depositing same in the United States mail with sufficient air mail postage affixed, addressed to:

NATIONAL LABOR RELATIONS BOARD,
Attention: HON. MARCEL MALLET-PREVOST
Assistant General Counsel,
Washington 25, D. C.

WILSON, BRANCH, BARWICK & VANDIVER,
Attention: ALEXANDER E. WILSON, JR.,
615 Rhodes-Haverty Building,
Atlanta 3, Georgia.

By
L. N. D. WELLS, JR.